

The EU's New Defence Policy – Beyond the Distinction Supranational / Intergovernmental

Jelena von Achenbach

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As outlined in the EU Global Strategy of 2016, the EU seeks to develop what it calls *strategic autonomy*, i.e., military self-reliance. To that end, the EU has introduced since 2017 what I call the EU's *New Defence Policy* – a concerted initiative consisting of a number of complementary measures that push for military integration and reinvigorate the long dormant Common Security and Defence Policy: most importantly, the Permanent Structured Cooperation (PESCO), which aims at and facilitates the joint, collaborative development of military capabilities, the integration of defense structures, and an enhanced availability of military forces for EU military operations. Furthermore, there are the *Coordinated Annual Review of Defence*, which will regularly survey the state of military capabilities within the EU and state opportunities and priorities for joint development projects; the *European Defence Fund*, which co-finance collaborative armaments projects; the *Military Planning and Conduct Capability*, which is an integrated command and control structure for EU missions; the *European Peace Facility*, which will finance EU military activity; and, last but not least, the integration of the market for military goods and the creation of a European defence industrial base.

All these measures and projects, in one way or the other, act on the Member States' decisions and action in the field of military policy. Yet, traditionally, this policy field is defined by state sovereignty. This makes the *New Defence Policy* a remarkable development: Military policy is not just another subject of European integration – the EU is getting involved here in what has been termed one of the *core state powers*.

In what follows, I will show that the *New Defence Policy* forms a significant development of EU integration in the field of military policy. This is consequential for normative questions of legitimacy, most importantly, sovereignty and democratic legitimacy, and I will present some thoughts on that.

EU Defence Policy: The Model of Intergovernmental Legitimacy

The Common Security and Defence Policy differs structurally from the EU's supranational policy fields. The EU Treaty states that it is defined and implemented by the European Council and the Council acting *unanimously*. The European Parliament and the Commission lack the formative political powers which define the EU's supranational law-making. Also, legal obligations are not enforceable by the European Court of Justice. Because of these structural rules, EU military policy is

widely interpreted as a form of *intergovernmental cooperation* that is categorically distinct from *supranational integration*.

The categorization as *intergovernmental* has normative consequences. It leads most legal analysts to conclude that the EU's policy-making in the field of defence and military matters, (1) does not touch on state sovereignty, and (2), is sufficiently legitimized by Member States' internal political processes. This is based on the assumption that, regarding military matters, state sovereignty *requires*, but is also effectively *upheld* by intergovernmental decision-making, as it requires state consent. Also, intergovernmental procedures and acts are assumed to leave intact the autonomy of states' internal decision-making.

As a result, national political processes are thought to effectively project their democratic legitimacy onto intergovernmental decisions and their implementation. Such a perspective also leads the German Federal Constitutional Court to hold (in its Lisbon Treaty judgment of 2009), that the Common Security and Defence Policy does not involve a transfer of powers to the EU level that violates Germany's sovereignty and constitutional identity. In particular, the Court argues that, because of its intergovernmental structure, EU defence policy leaves untouched the state's autonomous disposition of the monopoly on the use of military force – which it counts among the indispensable powers of the sovereign state.

The EU's New Defence *Policy*: Beyond Intergovernmentalism

Yet, even in the absence of further EU reforms after the Lisbon Treaty, EU defence policy has, in practice, developed significantly since. Empirical scholarship across different methodological and normative schools of thought indicates that it can no longer adequately be described in terms of intergovernmental politics. It has developed beyond intergovernmental cooperation and is unfolding an integrative dynamic. Central to this development is the specialized, Brussels-based bureaucracy that advises on EU security and defence policy and participates in its implementation, most importantly, the *Political and Security Committee*, the *EU Military Committee* and the *EU Military Staff*. Empirical studies show that this bureaucracy, even if it is (partly) staffed by Member States' delegates, does not merely aggregate national preferences. Rather, national governments have loosened the reins and are not exercising tight control of this bureaucracy. This sets free at least *some* original, common will-formation at the EU level, which occurs based on expertise and socialization within the bureaucracy. Thus, *common* instead of aggregative-intergovernmental policy-making is, in fact, influencing formal decisions by the Council. Empirically, EU defence policy-making thus transcends the intergovernmental form.

The EU's New Defence Policy involves further departures from intergovernmentalism. Its overarching project, the Permanent Structured Cooperation (PESCO), illustrates this: PESCO politically empowers the centralized EU bureaucracy for military matters. But moreover, it is designed to give the EU

substantive regulatory impact on the Member States' military policies. PESCO aims at making the EU strategically autonomous, i.e. capable to act independently by military means ("military agency"). The EU's military agency is to be based on the integration and strengthening of the Member States' military capabilities. Consequently, as participants of PESCO, Member States are obliged to increase their defense spending, collaboratively develop further military capabilities, integrate existing defense structures, and make available effective, interoperable forces for EU military operations.

In the PESCO framework, the *Political and Security Committee*, the *Military Committee of the European Union*, the *EU Military Staff*, and the *European Defence Agency* are formatively involved in developing and implementing concrete policies and projects. Also, PESCO encompasses regulatory instruments that normatively address Member States' legislative and administrative policies. Financial and organizational means incentivize the implementation of PESCO by the Member States, such as funding of collaborative armaments projects by the *European Defence Fund* or administrative support for such projects by the *European Defence Agency*. And even if they are not enforceable by the European Court of Justice, PESCO obligations are sanctioned: The Council's PESCO-related decisions are enforced by a tight, centralized oversight regime. Implementation is structured by a schedule and sequenced phases. Member States have to report their progress, efforts and plans regarding implementation. In regular intervals, the Council reviews their performance and planning, based on the advice of the EU security and defence bureaucracy. A number of quantitative indicators are applied as yardsticks. Ultimately, PESCO obligations are sanctioned by the Council's right to exclude, by qualified majority vote, non-complying Member States from PESCO – and thus, from its significant politico-economic benefits.

Gaps of Political Legitimacy

While most legal scholarship and the *Bundesverfassungsgericht* hold that Member States remain self-governed in the field of military policy, the *New Defence Policy* illustrates that this is not the case. PESCO shows how the *New Defence Policy* is subjecting the Member States to regulatory measures which are generated and enforced through EU political processes that clearly leave behind the intergovernmental form.

While EU military policy does not work in an intergovernmental way, it is not supranational, either. Rather, it seems to embody a form in between. Some observers suggest descriptors such as *supranational intergovernmentalism*, *Brusselsization* or *deliberative intergovernmentalism*. I think that the notion of *transgovernmental relations* could be promising to describe this state of political integration. The term *transgovernmental* was introduced in International Relations scholarship to describe *sets of direct interactions among subunits of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments* (Keohane/Nye). I think that this notion allows to capture how, in EU military policy, intergovernmental rules still govern

formal law-making but are overcome by (some) common will-formation in a centralized bureaucracy.

Yet, PESCO not only empowers an EU bureaucracy that is not thoroughly controlled by national capitals. It also directs at the Member States regulatory measures that are designed to normatively influence their internal legislative and administrative decision-making. Therefore, sovereignty is not a suitable notion to describe the political status of the Member States in the field of military policy. With PESCO and the complementary projects of the *New Defence Policy*, the EU gets involved in the Member States' internal decision-making on military matters. As a result, they are not holding exclusive political authority and are not fully autonomous in this policy area. And furthermore, the EU's regulatory efforts aim at establishing at the EU level something that is commonly held to signify sovereign statehood: the capacity to exercise military force.

Therefore, the meaning of sovereignty in the field of military matters seems to be undergoing a substantive evolution: Through EU political processes and action, the states exercise a form of collective, integrated political authority and agency in the field of defence. Sovereignty, however, is mostly an abstract, theoretical concern. The democratic question is a more practical one, and a pressing one, at that. If original, collective will-formation is taking place at the EU level, national political processes can no longer be effective as source of legitimacy for the resulting policies. This effect increases if the Member States internal decision-making is subject to regulatory measures: If EU measures curtail the room for maneuver that national political processes have, this also means that these processes cannot fully realize their democratic potential. Both constellations apply to the *New Defence Policy*, as PESCO illustrates. Therefore, the New Defence Policy destabilizes and undermines the intergovernmental model of political legitimacy. Yet, intergovernmental legitimacy is what the EU Treaty relies on for EU defence policy. So, as of now, EU defence policy seems to be bound to a model of legitimacy that is not up to date with the state of political integration.

